

No. 72028-7-I

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 1**

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**TIMOTHY WHITE**

**V.**

**SKAGIT COUNTY; ISLAND COUNTY**

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**APPELLANT'S REPLY TO RESPONDENTS' BRIEFS**

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Knoll D. Lowney, WSBA No. 23457  
 Marc Zemel, WSBA No. 44325  
 Smith & Lowney, P.L.L.C.  
 2317 East John St.  
 Seattle, WA 98112  
 (206) 860-2883

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## **I. INTRODUCTION**

Allowing public access to these critical election records under the Public Records Act (PRA) would further transparency in our election process, which is vitally important to maintaining the public's confidence in our electoral system. The statutory and constitutional provisions that protect secrecy of the ballot and insure against ballot tampering have the same goals and are complementary to the goals of election transparency. Those provisions do not create an exemption from the PRA and Skagit and Island Counties ("counties") have not shown that production of the public records in question would in any way undermine the secrecy of the ballot or allow ballot tampering. The Counties' strained constitutional and statutory arguments and their wild speculations about the harms that could result from allowing public access cannot justify casting a shroud of secrecy over the election process.

The counties do not dispute that the images Appellant White (hereafter "Plaintiff") requested are "public records" and have not met their burden to show production would jeopardize the constitutional secrecy in voting or allow ballot tampering. The Court should therefore order immediate production of the records requested and remand for calculation of penalties and other relief.

## II. ARGUMENT AND AUTHORITY

### A. Election Transparency is Compatible with a Secret Ballot

Public release of anonymous ballot images provides a level of access to our election process consistent with state practices and legislative intent for transparent elections, while safeguarding the right to a secret ballot. The fundamental flaw with the counties' position is that they argue ballot secrecy necessarily precludes election transparency, which is a false choice. Public verification and the secret ballot work together to guarantee Washington elections are free and fair.

#### 1. Election Records and Ballot Images Are Public to Preserve Election Integrity

Election transparency is critically important to the integrity of our elections and the counties have not carried their burden to show any explicit PRA exemption exists to override the public's interest in the requested records. In Washington, we recognize an interest in "preserving electoral integrity" through "promoting transparency and accountability in the electoral process, which [it] argues is essential to the proper functioning of a democracy." Doe v. Reed, 561 U.S. 186, 198 (2010) (internal quotation marks omitted); *see also*, Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (*per curiam*) ("Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy.").

Transparency supports electoral integrity by exposing and deterring mistakes and fraud, which “drives honest citizens out of the democratic process and breeds distrust of our government.” Reed, 561 U.S. at 197 (quoting Purcell, 549 U.S. at 4). It is also the expressed policy of our state that “public confidence in government at all levels is essential and must be promoted by all possible means...[including] *full access to public records so as to assure continuing public confidence of fairness of elections...*” RCW 42.17A.001(5) (emphasis added); *see also id.* at .001(11).

The counties do not dispute that the requested records are “public records,” so the Court should provide full access to them “to assure continuing public confidence of fairness of elections...” *Id.* at .001(5).

## **2. Article 6 Section 6 Provides Voter Anonymity**

In addition, the counties still have not met their burden to show production of the records would violate Art. 6 sec. 6 by revealing how individuals voted. RCW 42.56.550(1). Unable to point to any evidence in the record, the counties ask the court to speculate about the public’s ability to compare separate pieces of information to identify voters. *See* Skagit County Response<sup>1</sup> (hereafter “Skagit Brief”) at 39-40 (without providing a

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<sup>1</sup> Island County adopted the majority of Skagit County’s Response Brief as its own. Amended Brief of Respondent Island County (hereafter “Island Brief”) at 2. Plaintiff

single supporting citation to the record). The Court must not accept the counties' invitation to speculate. State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977) (appellate court "may not speculate upon the existence of facts that do not appear in the record."). Without carrying their burden with specific reference to evidence, the counties must produce the records.

Our constitutional right to "absolute secrecy in preparing and depositing" our ballots (Art. 6 sec. 6) ensures that *no one*—not even county auditors or temporary election workers who scrutinize cast ballots—has the right to know how someone else votes. Moyer v. Van De Vanter, 12 Wash. 377, 382 (1895) ("the ballot shall be a secret one, that it may not be known for which candidate any particular voter voted, in order that bribery may be prevented.").<sup>2</sup> Plaintiff's PRA request does not seek any information that would violate the constitutional secrecy in voting, nor should compliance with the request reveal any.

Elections are not autocratic; the people have a critical role. *See* Plaintiff's Opening Brief at 19-20. To ensure the constitutional right to a secret ballot where citizens observe and inspect ballots every election, the

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therefore attributes arguments provided in Skagit's Brief as arguments of "the counties," collectively, throughout this reply brief.

<sup>2</sup> This is precisely the same secrecy in voting guarantee provided by the Colorado constitution, despite the counties' representations to the contrary (Skagit Brief at 30). *Compare Marks*, 284 P.3d, 118, 121-22 *with Moyer*, 12 Wash. at 382.

Legislature codified that “no record may be created or maintained” that identifies how a voter voted, including the ballot itself. RCW 29A.08.161; *see also* RCW 29A.36.111(1); RCW 29A.04.206(2).

These enactments are essential to keep votes anonymous where election workers, officials and public observers inspect cast ballots, count ballots, and make vote tallies. CP 160 (workers inspect ballot markings in the presence of observers); *See also e.g. Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*, 82 P.3d 1199, 119 Wn.App. 665, 674-75 (Div. 2 2004) (describing absentee ballot process where Pierce used “temporary election workers—often retirees—” to examine cast paper ballots and “remake” them if they were not machine readable.). The Legislature possessed the wisdom and foresight to protect voters’ anonymity while innumerable eyes scrutinize ballots and election records.

The autocratic secrecy the counties project is not the voting secrecy the constitution provides. The counties suggest Art. 6 sec. 6 requires that ballots must be “hidden or concealed” without “restriction, exception, or qualification” (Skagit Brief at fn. 6) from the moment a voter deposits her ballot until the ballot and all electronic images are destroyed. *Id.* at 13. Such unqualified concealment of ballots, even after deposited by the voter, cannot be reconciled with a system dependent on public confidence and where people are expressly permitted to observe ballots

and obtain election records. *See* CP 160; Loeffelholz, 119 Wn.App. at 674-75; RCW 29A.60.170(2); RCW 29A.64.041; RCW 29A.40.130; RCW 29A.04.230; WAC 434-262-025. The counties' recognition that "the counting center and canvassing board meetings are open to the public" (Skagit Brief at 5) undercuts their argument that Art. 6 sec. 6 prevents the public from seeing the scanned images at issue.

In practice, the constitution provides an unqualified right to vote anonymously; it does not dictate a ballot can never be seen by anyone other than the voter. Art. 6 sec. 6 is therefore akin to a "conditional exemption," described in Resident Action Council, exempting only information that reveals how an individual voted in an election. 300 P.3d at 383-84 (if applying the exemption requires a particularized finding of the need to protect a privacy right or a vital governmental interest, it is conditional). The counties have not met their burden to show the digital images reveal how individuals voted or how disclosure would in any way jeopardize secrecy in voting. *See* Plaintiff's Opening Brief at 17-19; CP 159 ("separating the ballot security envelope from the declaration envelope...removes the identity of the voter before the secrecy envelope is opened."); Skagit Brief at 26 ("images of ballots from the Ballot Now tabulating program...would not have recorded the source of any ballot.").

When “the condition is not satisfied in the given case, the records must be disclosed.” Resident Action Council, 300 P.3d at 385.

**3. Election Records and Ballot Images Are Expressly Public**

Indeed in Washington, election records—including ballot images—are public, further showing our elections are not the black boxes the counties portray. *See e.g.* RCW 29A.04.230 (requiring Secretary of State to keep election records where s/he canvasses the results and must “make such records available to the public upon request.”).

RCW 29A.04.230 is relevant because it shows the Legislature’s intent to make all election records and materials public, including the county-created images at issue. The counties argue only “canvassing records” are available to the public under that statute (Skagit Brief at 34), which taken as true would certainly include the records in question here. The counties created the requested records to assist in canvassing the election with the Hart Intercivic system, and the records are therefore publicly accessible. *See* RCW 29A.04.013; CP 149-50 at ¶¶ 3, 6; CP 182.

Yet this affirmative statement that canvassing and election records are public is not even necessary to compel the counties to produce the records under the PRA. Under the Act public access to public records is the default, qualified only by explicit exemptions (which are absent here). RCW 42.56.070(1). By singling out canvassing records, the Legislature

clarified the public's right to access them because of the profound importance election transparency has for our democratic system. Regardless of which agency holds the records, the importance of transparency remains. In this case, the counties possess the requested records and Plaintiff properly issued his request to them. CP 220.

#### **4. Pierce County Publishes Records of Individual Votes**

To further election transparency, Pierce County published "ballot image reports" online, which provide the unique ID numbers for each of the 299,132 ballots cast in their 2008 election and the corresponding votes cast on each of those ballots. Declaration of Vladimir Kogan ("Kogan Decl."), ¶¶ 3-4.<sup>3</sup> Those "ballot image reports" are "electronic record[s] of the choices of an individual voter in a particular [election]" (RCW 29A.04.008(1)(c)), like the records Plaintiff requested here, so the Court should treat them the same and protect the public's access to them. Pierce County's practice shows the benefit of providing this type of information to the public, clarifies the statutory "ballot" definition does not encompass the digital files Plaintiff requested, and confirms there are no PRA exemptions for these kinds of records.

First, each voter has only one "ballot." Plaintiff's Opening Brief at 24-27. Because voters recorded their choices on a paper ballot before

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<sup>3</sup> See Appellant's Motion to Take Additional Evidence

Pierce, Skagit and Island created a separate electronic record of individual votes, the derivative electronic records are not the “ballots.” *Id.* Pierce certainly does not treat “the electronic record of the choices of an individual voter” as a “ballot.” *See Kogan Decl.* So any statute regulating “ballot” handling does not exempt the electronic records at issue. And even if the digital records of corresponding paper ballots were also “ballots,” Pierce County’s practice of posting those records online for the public shows there is no PRA exemption anyway. These conclusions are supported by law and provide the transparency the Legislature envisioned.

Second, the academic use of Pierce’s ballot image reports illustrates the public benefit of full transparency. Because those records were available for scrutiny, political scientists were able to identify problems with certain election systems and provide their findings for policy makers. *See Kogan Decl.* at ¶ 4.<sup>4</sup> Public access to the records Plaintiff requested would provide similar opportunities for academic involvement and public verification, as the Legislature intended.

**B. The Out of State Authorities Are Persuasive**

The counties spend six pages trying to convince the Court to ignore the on-point authorities Plaintiff cited from other states, without

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<sup>4</sup> *See also* Burnett, Craig M. and Kogan, Vladimir, Ballot (and Voter) ‘Exhaustion’ Under Instant Runoff Voting: An Examination of Four Ranked-Choice Elections (November 5, 2014), forthcoming, available at SSRN: <http://ssrn.com/abstract=2519723>

distinguishing them. Skagit Brief at 30-36. As the Supreme Court has done in a PRA case in the past, the Court should adopt the reasoning in Marks v. Koch, 284 P.3d 118 (2011), Price v. Town of Fairlee, 190 Vt. 66, 26 A.3d 26 (2011) and the other authorities cited because of the “remarkably similar scenario” they present. Gendler v. Batiste, 174 Wn.2d 244, 261 (2012) (adopting reasoning of Louisiana court).

**1. All the States Require Secret Ballots and Publish Images**

The Court should follow the reasoning of the jurisdictions that provide copies of ballots as public records so Washington can enjoy the same level of election transparency. All the states mentioned in Plaintiff’s opening brief, including Vermont, mandate secret ballot elections like Washington, so the comparisons are apt. See Smith & Son, Inc. v. Town of Hartford, 196 A. 281, 283, 109 Vt. 326 (Vt. 1938) (“The material guaranty of this constitutional mandate of vote by ballot is inviolable secrecy as to the person for whom an elector shall vote...no one else shall be in a position to know for whom he has voted...”); Nelson v. Bullard, 194 N.W. 308, 311, 155 Minn. 419 (Minn. 1923) (“The vital purpose of our ballot system is twofold: First, to enable each voter to cast a secret ballot; and second, to require him to do so.”); Cal. Const. Art. 2 sec. 7; Colo. Const. Art. 7, sec. 8; Mich. Const. Art. 2, sec. 4.

In fact, the secret ballot is a fundamental principle throughout the United States, showing production does not violate any constitutional mandate. *See* Skagit Brief at 22 (“one of the great political reforms was the advent of the secret ballot *as a universal practice*.” (quoting Buckley v. Valeo, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring in part, dissenting in part) (emphasis added); Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 290 (2007) (“anonymity of voting is a fundamental principle of American democracy today.”): Burson v. Freeman, 504 U.S. 191, 214 (Scalia, J. concurring) (describing the secret ballot as a “venerable” part of the American tradition).

Because Washington’s same secrecy in voting requirement is the rule of the land where states already provide copies of cast ballots to the public, the Court should adopt the reasoning in Colorado and Vermont to protect election transparency through public verification.

## **2. Records Retention Schedules Do Not Show Exemptions**

The counties argue Price is distinguishable because Vermont law provides a permissible ballot destruction schedule, even though Washington law provides the same thing. *See* Skagit Brief at 31-32; RCW 29A.60.110 (“retained for at least sixty days”). Indeed, the counties do not cite to any Washington statute to show a contrast, instead relying on the Secretary of State’s administrative schedule. Skagit Brief at 32. The

truth is, Washington statute does not mandate ballot destruction, either. The Secretary of State's retention schedule relies on two administrative rules (*see* CP 74), neither of which mandate ballot destruction. WAC 434-262-200 and WAC 434-219-330.

In any case, retention schedules, which are implemented for all government records subject to the PRA, do not provide PRA exemptions. *See e.g.* Washington State Archives, Office of Secretary of State, *State Government General Records Retention Schedule* (August 2011), available at [http://www.sos.wa.gov/\\_assets/archives/RecordsManagement/SGGRRS5.1.pdf](http://www.sos.wa.gov/_assets/archives/RecordsManagement/SGGRRS5.1.pdf); Secretary of State, *State Government Records Retention Schedules*, <http://www.sos.wa.gov/archives/RecordsManagement/RecordsRetentionSchedulesforStateGovernmentAgencies.aspx> (last visited November 7, 2014) (providing links to records retention schedules for all Washington state agencies). There are countless examples where retention schedules are provided for records made public upon request. Requiring records' retention ensures their availability to the public, it does not exempt records from production.

### **3. California and Minnesota Practices Provide Meaningful Examples**

The counties also implore the Court to disregard California and Minnesota practice of posting digital images of cast ballots online for

public review, even though those examples show there is no harm in producing the images here. Skagit Brief at 35. Plaintiff cited to those examples to demonstrate that digital images of cast ballots are routinely released to the public electronically, and that the sky does not fall. Considering the counties' apocalyptic portrayal of a world where these images are public, real-life examples showing no such problems exist are relevant and should persuade the Court. There is no evidence that publicizing ballot images reveals how individuals voted or cause harm.

**C. Title 29A RCW Does Not Exempt the Records**

Statutory provisions that are designed to safeguard cast ballots from tampering are likewise designed to increase confidence in elections and do not exempt the requested records from production under the PRA. The counties incorrectly highlight the “cradle to grave” chain-of-custody provisions that aim to ensure cast ballots are not lost or tampered with, without identifying any statutory intent to remove ballots from public scrutiny. *Id.* at 13-15, 20; *see e.g.* RCW 29A.60.110 (permitting observers to watch ballots transferred from one “sealed” container to another).

Title 29A provides those chain-of-custody provisions to preserve the authenticity of official paper ballots as compiled in case of a recount or election contest. That purpose permits public access to related digital files when there is no risk of tainting the ballot box, like here. Indeed, the

Vermont Supreme Court concluded that ballots are kept under seal to “preserve their integrity and reliability as physical evidence” and to have “the identical verity they bore when cast,” permitting public access despite those storage precautions. Price, 26 A.3d at 32 (interpreting, *inter alia*, 17 V.S.A. § 2590(a), (c)). The Court should follow the Vermont Supreme Court’s reasoning to determine the chain-of-custody purpose because of the “remarkably similar scenario” it addresses. Gendler, 174 Wn.2d at 261 (adopting reasoning of Louisiana court). The chain-of-custody provisions of Title 29A RCW have no bearing on Plaintiff’s request.

Moreover, in Loeffelholz, 119 Wn.App. 665, the Washington Court of Appeals concluded that laws requiring ballots be placed in containers “secured with numbered seals... [and] stored in a secure location”<sup>5</sup> did *not* remove “the process of ‘remaking’<sup>6</sup> absentee ballots” from the public eye. *Id.* at 673, 704. It follows that the same secure storage/chain-of-custody requirements do not exempt digital ballot images from public access.

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<sup>5</sup> Compare former RCW 29.36.060 (discussed in Loeffelholz) with RCW 29A.40.110 (relied on by the counties, here).

<sup>6</sup> The ballot “remake” process is now known as ballot “duplication.” CP 159 (“the process of transferring the voter’s intent...”); RCW 29A.60.125. In Loeffelholz, the court also described a ballot examination process (119 Wn.App. at 673-74), now known as the “ballot resolve” process, which Skagit and Island County do digitally, viewing the scanned images of ballots in the Ballot Now program, without handling the original paper ballots. CP 160 (resolving ballots “is done by bringing up the digital images of the ballots...”).

It is determinative that the Legislature did not design the chain-of-custody provisions of Title 29A to remove ballots from public scrutiny because “The PRA’s exemptions are provided **solely** to protect relevant privacy rights or vital governmental interests that sometimes outweigh the PRA’s broad policy in favor of disclosing public records.” Resident Action Council, 300 P.3d at 382 (emphasis added); *see also* Deer v. DSHS, 122 Wn.App. 84, 91 (2004) (The PRA “exempt[s] from its purview *only* those ‘public records most capable of causing substantial damage to the privacy rights of citizens.’” (emphasis added) (quoting Limstrom, 136 Wn.2d at 607)); Fisher Broadcasting Seattle TV LLC d.b.a KOMO 4 v. City of Seattle, et al. No. 87271-6, Slip Op. at 13 (Wash. Sup. Ct., June 12, 2014) (finding no exemption in an “other statute” where the legislative goal was not to protect personal privacy).

**1. Chapter 13.50 RCW is Not Analogous**

The counties fail in trying to analogize the chain-of-custody provisions of Title 29A RCW and the juvenile privacy exemptions of Chapter 13.50 RCW by ignoring the fundamental differences between those statutes. *See* Skagit Brief at 20-22. While the appellate court found a PRA exemption in Chapter 13.50 RCW (*see* Deer v. DSHS, 122 Wn.App. 84 (2004)), that chapter regulates sensitive records in juvenile court files, where the legislature has recognized the importance of secrecy

to protect minors. *See* Laws of 2014, ch. 175, § 1(2) (“the interest in juvenile rehabilitation and reintegration constitutes compelling circumstances that outweigh the public interest in continued availability of juvenile court records.”). There is not the same level of public interest in accessing those records as is present for the requested records in the election context. While the balancing of privacy and public records may weigh towards privacy in the context of juvenile records, that is not the case for elections. There is an overwhelming public interest in assuring transparency in elections, to ensure that the elections are actually fair and the public has trust in our election system. *See* Section II.A.1, above.

Moreover, sealing juvenile records is specifically designed so the juvenile can overcome prejudice and reintegrate into society. Laws of 2014, ch. 175, § 1(1) (“The public has a compelling interest in the rehabilitation of former juvenile offenders and their successful reintegration... When juvenile court record are publicly available, former juvenile offenders face substantial barriers to reintegration...”).<sup>7</sup> Sealing these records is specifically intended to create secrecy around a court process, whereas sealing containers with ballots merely documents authorized access for chain-of-custody purposes.

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<sup>7</sup> The profoundly sensitive and damaging information in juvenile records are obviously not “innocuous” as the counties represent. Skagit Brief at 24.

Comparing the statutory language also shows Chapter 13.50 RCW contains “explicit exemption” language, while Title 29A does not. First, Chapter 13.50 RCW is titled “Keeping and Release of Records...,” summarizing its purpose. Second, the chapter explicitly states records “shall be confidential and shall be released only pursuant” to another section. RCW 13.50.100(2); *See also id.* at .100(3)-(7) (explicitly regulating circumstances where records may be “*released*”); RCW 13.50.050(2) (“shall be open to the public, unless sealed” by another chapter); *id.* at .050(3)-(10) (also regulating circumstances where certain records may be “*released*”). Title 29A contains no statement of intent to exempt the records under the PRA at all.

The exemptions under Chapter 13.50 are explicit, clearly aimed at protecting the privacy interests of juveniles, in contrast to the chain-of-custody provisions of Title 29A. Comparing these two statutes illustrates that the chain-of-custody provisions in Title 29A RCW do not contain any explicit exemption to Plaintiff’s request.

**2. Even If Title 29A RCW Provided a PRA Exemption, Its Purpose Limits Its Scope.**

Even assuming Title 29 RCW provides a PRA exemption for ballots—a dubious conclusion considering the absence of any indication that the chain-of-custody provisions are intended to remove ballots from

public scrutiny—its scope would be very limited and inapplicable here. Hearst, 90 Wn.2d at 133 (“the purpose of [an] exemption severely limits its scope.”); *see also* PAWS II, 125 Wn.2d at 256.

As mentioned, the purpose of keeping ballots in sealed containers under the chain-of-custody provisions of Title 29A is to prevent and detect inadvertent or fraudulent alterations to the election tally, and to ensure the authenticity of ballots for a recount or contest. Price, 26 A.3d at 32. Courts have repeatedly recognized that this is the purpose of sealed containers. *See e.g.* State v. Brown, 145 Wn.App. 62, 184 P.3d 1284 (Div. 3, 2008) (blood test container sealed to show sample is free from adulteration).<sup>8</sup> Therefore, any PRA exemption found in Title 29A RCW would be severely limited to situations where producing records risks ruining the chain-of-custody, a situation absent here.

Because the counties create the digital ballot images at issue *before* the paper ballots are placed in sealed ballot boxes—and copying the images does not require accessing the paper ballots anyway—producing

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<sup>8</sup> *See also* State v. Doe, 6 Wn.App. 978, 497 P.2d 599 (Div. 2 1972) (drugs sealed in containers “for preservation as evidence”); Geisness v. Scow Bay Packing Co., Inc., 16 Wn.2d 1, 132 P.2d 740 (1942) (sealing salmon containers helped determine the timing of contamination); State v. Tretton, 1 Wn.App. 607, 610, 464 P.2d 438 (Div. 2 1969 (“The fact that other persons had access to the vault in which the envelope was placed does not alone create a missing link in the chain of custody. Lt. Snyder testified that he broke the seal on the envelope when he received it. This sufficiently establishes that the material had not been tampered with...”).

the requested images creates no chain-of-custody risks. CP 160 (“A team of two election workers will scan the ballots...The scanned ballots are then placed into a secure storage container.”); CP 182 at lines 14-17, CP 184 at lines 16-19 (scanned images are sent to the Ballot Now program, with which the counties can “screen print” the ballot images to a Word document or PDF, without opening the ballot boxes); CP 160 (a computer is capable of “bringing up the digital images of the ballots” on a screen). Since there are no chain-of-custody or ballot-tampering risks, Title 29A RCW does not exempt the records in question from production.

**D. Redaction is Required**

The counties are wrong that redaction is not required where identifying marks can be removed from the records. *See* Skagit Brief at 19. The counties parrot similar arguments presented by the agency in Resident Action Council, 300 P.3d 376 (2013), which the Supreme Court rejected. There, the agency argued that “the PRA’s redaction requirement, which applies only to information the disclosure of which would violate personal privacy or vital governmental interests, does not apply to any categorical exemptions and applies only to conditional exemptions.” *Id.* at 386. The Court concluded the agency was “clearly wrong” (*id.* at 387), explaining that “an agency must redact to overcome any and all relevant exemptions, insofar as possible. Requiring anything more or different

would be too complicated, unworkable, and time-consuming for agencies operating under the PRA.” *Id.* (citations omitted).

Here, “[i]f [the counties’] interpretation were correct, only a small number of PRA’s numerous exemptions... would be subject to the redaction requirement, contrary to the overriding purpose of the PRA and the legislature’s admonition that the PRA ‘shall be liberally construed and its exemptions narrowly construed.’” *Id.* If the requested records turn out to contain information revealing how individuals voted—despite no such evidence in the record—the counties must redact that information before producing the images to protect voters’ constitutional right.

E. **The Counties and Trial Court Misconstrue Plaintiff’s Request**

1. **Plaintiff Tailored His Request to Avoid Disrupting the Election.**

Plaintiff requested copies of “digital image files of all pre-tabulated ballots,” “without disruption of the election.” CP 220, 222. To comply, the counties did not need to alter their canvassing process, which already scans all ballots as a matter of course before they are tabulated, creating the digital images of the “pre-tabulated ballots” that Plaintiff requested. CP 160 (Scanning and Resolving ballots); CP 150 at ¶ 4; CP 182 at lines 12-15. The counties could have provided the records on an installment basis, without disrupting the election. RCW 42.56.080.

The counties continue to misrepresent that Plaintiff “explicitly requested” that the counties produce ballots before they were tabulated and that complying would have delayed certification, when that is not the case. Skagit Brief at 6, 8. Tellingly, the counties made no claim that complying with Plaintiff’s request would disrupt the election in their initial responses (CP 230; CP 234-36). In fact, Skagit County did not even respond to Plaintiff’s request until after the election was certified. CP 230 (12/5/13 response); CP 182 (11/26/13 certification). Had Skagit produced the requested records on December 5, 2013 instead of wrongfully withholding them, it would have fully complied with Plaintiff’s request.

**2. Plaintiff’s Motives are Irrelevant and He Did Not Seek to Contest the Election with His Request**

Plaintiff’s purpose for making his request is completely irrelevant. Koenig v. City of Des Moines, 158 Wn.2d 173, 190, 142 P.3d 162 (2006); King County v. Sheehan, 114 Wn.App. 325, 341 (Div. 1, 2002). The Court should therefore not even consider Plaintiff’s purpose, but even if the Court does, Plaintiff did not make his request to contest the election as the counties claim. The counties misrepresent Plaintiff’s motivation in an ill-conceived scheme to place his request under the exclusive purview of Chapter 29A.68 RCW. Yet, even if the purpose was relevant to find an exemption (it is not), and even if Plaintiff’s purpose was to contest an

election (it was not), Chapter 29A.68's alternative means of accessing ballot information is not exclusive and does not supplant the PRA. *See* Plaintiff's Opening Brief at 34-35.

When misrepresenting Plaintiff's request as an election contest, the counties ignore his explicit reference to overseas voter registration, which he wanted to verify. CP 221 ("In the case of requested overseas and military voter registration received electronically...the window to research and document a challenge is but two weeks"); Skagit Brief at 6 (omitting Plaintiff's reference to voter registration). Plaintiff's request clearly shows the "challenge" to which he referred was a challenge to voter registration. *See* RCW 29A.08.810. Such a challenge is wholly separate from the "election *contest*" the counties ascribe. *See* Skagit Brief at 38.

Moreover, Plaintiff's motivation extended much further, seeking to "increase public involvement with the election process, increase oversight, and avoid errors, fraud or abuse by election officials who would know the public is watching—not to challenge or contest the election." Plaintiff's Opening Brief at 34, fn. 33.<sup>9</sup> Regardless, Plaintiff's purposes are irrelevant. Koenig v. City of Des Moines, 158 Wn.2d at 190; King County v. Sheehan, 114 Wn.App. at 341.

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<sup>9</sup> Plaintiff brought these reasons to the Court's attention in his opening appellate brief, making it puzzling that the counties' claimed Plaintiff did not deny an intent to contest an election. *See* Skagit Brief at 38.

### 3. The Counties' Scanning Process is Not "Duplication"

Scanning ballots as they arrive and copying public records under the PRA are not "duplications" under RCW 29A.60.125, so any statutes regulating "duplicate" ballots are inapplicable to Plaintiff's request. The trial court fundamentally misconstrued the statutory ballot "duplication" process in finding an exemption. *See* Plaintiff's Opening Brief at 28-29. RCW 29A.60.125 provides unique instructions for "duplicating" damaged ballots to permit the Hart Intercivic system to count votes—not for routine ballot-scanning process or copying public records.

The counties now attempt to reinforce the trial court's erroneous application, despite never previously arguing their routine ballot-scanning constituted "duplication." *See* Skagit Brief at 10.<sup>10</sup> The counties create the requested digital images as a matter of course, as soon as they are received from the voter—this is not "duplication." CP 159 (Duplication); CP 160 (Scanning); CP 150 at ¶ 4; CP 182 at lines 12-15.

#### F. Skagit County Needed to Search for Metadata

Skagit violated the PRA's strict procedural requirements by failing to make a reasonable search for metadata and failing to disclose the

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<sup>10</sup> In their past pleadings, the counties correctly described the rare "duplication" process for transferring a voter's intent to a new ballot in a way the Hart Intercivic system can read the votes. CP 94 at ¶ 13; CP 150 at ¶ 6; CP 159 (canvassing board instructions for "duplication"); CP 164 and 182 ("Except when needed to allow processing of damaged ballots and for the scanning of ballots into voting devices, ballots are not copied.").

responsive records in its possession. Neighborhood Alliance of Spokane County v. City of Spokane, 172 Wn.2d 702, 719-21, 261 P.3d 119 (2011). Because Skagit did not inquire with the “vendor” about the presence and ability to copy metadata, they did not conduct a reasonable search. *See* Skagit Brief at 7.

Skagit claims it did not know what Plaintiff meant by “metadata” because Plaintiff’s request could have encompassed “logs of information about images” or “proprietary data, which would have required the county to notify the vendor before releasing any records.” *Id.* Plaintiff has already established that the Supreme Court has explicitly defined “metadata” for PRA purposes and that both counties understood his request. *See* Plaintiff’s Opening Brief at 44. Skagit’s latest argument turns on the *scope* of Plaintiff’s request for metadata, not the meaning of “metadata.” A simple reading of Plaintiff’s request shows Plaintiff did not limit the scope of his metadata request, he wanted all “the original metadata and Properties” of the files requested. CP 220. Skagit County is in a far better position than Plaintiff to identify each piece of metadata created by the Hart Intercivic programs and needed to inform Plaintiff what records they had and what they were withholding. Instead, Skagit feigned ignorance about the request and asked for clarification.

Had Plaintiff “clarified” that he was requesting “‘data about data’ or hidden information about electronic documents created by [the Hart Intercivic] software programs” (O’Neill v. Shoreline, 170 Wn.3d 138, 143 (2010)), clarification already available to Skagit, nothing would have changed. Plaintiff could not further “clarify” the specific type of metadata in which he was interested because Skagit did not disclose what metadata it possessed. Skagit needed to search through the logs of information it now acknowledges, inquire with the vendor about additional metadata, and disclose all the metadata and Properties related to the requested files.

### **III. CONCLUSION**

For the reasons explained above and in Plaintiff’s Opening Brief, this Court should reverse the Superior Court’s decision and order production of all requested records, recovery of Plaintiff’s reasonable attorney’s fees and costs, and impose a daily penalty for the counties’ PRA violations.

Respectfully submitted this 13<sup>th</sup> day of November, 2014

**SMITH & LOWNEY PLLC**

By   
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Knoll Lowney, WSBA No. 23457  
Marc Zemel, WSBA No. 44325

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 14, 2014, I served the foregoing Reply Brief of Appellant to the following by U.S. Mail and e-mail:

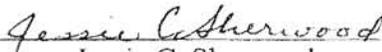
Skagit County Prosecuting Attorney's Office  
Arne O. Denny, WSBA #14021  
Melinda Miller, WSBA #30143  
605 South Third Street  
Mt. Vernon, WA 98273  
Tel: (360) 336-9460; Fax: (360) 336-9497  
Email: arned@co.skagit.wa.us; melindam@co.skagit.wa.us

Island County Prosecuting Attorney's Office  
Daniel B. Mitchell, WSBA #38341  
P.O. Box 5000  
Coupeville, WA 98239  
Tel: (360) 679-7363; Fax: (360) 240-5566  
Email: D.Mitchell@co.island.wa.us; P.Switzer@co.island.wa.us

Rebecca R. Glasgow  
Deputy Solicitor General  
PO Box 40100  
Olympia, WA 98504  
Email: RebeccaG@atg.wa.gov; StephanieL1@atg.wa.gov

William John Crittenden  
300 E. Pine Street  
Seattle, WA 98122  
Email: wjcrittenden@comcast.net

**Dated** this 14th day of November, 2014, at Seattle Washington.

  
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Jessie C. Sherwood